

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA and No. 2:04-cv-1955-MCE-PAN (JFM)
the STATE OF CALIFORNIA
ex rel. MIKE STIERLI,

Relator Plaintiff,

v.

ORDER

SHASTA SERVICES INC. dba
TIMBERWORKS; and DOES 1
through 50, inclusive,

Qui Tam Defendants.

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By Order filed July 11, 2006, this Court granted Motions to Dismiss brought by both the United States of America ("United States") and the State of California ("State") with respect to the viability of this *qui tam* action. The *qui tam* Plaintiff, Mike Stierli, had sought to invoke false claims provisions contained within both federal and state law.

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1 In bringing the present motion, Defendant Shasta Services Inc.
2 dba Timberworks ("Timberworks") seeks to recover attorneys' fees
3 expended in defending this matter in the amount of \$130,946.11.
4 That motion is denied.

5 Both the Federal False Claims Act, 31 U.S.C. § 3729, et seq.
6 ("FCA") and its state law counterpart, California Government Code
7 § 12650, et seq. ("CFCA") provide that a prevailing defendant in
8 a *qui tam* action can recover its attorney fees if the underlying
9 claim was clearly frivolous, vexatious, or brought for purposes
10 of harassment. Section 3730(d)(4) of the FCA provides in
11 pertinent part as follows:

12 "If the Government does not proceed with the action and the
13 person bringing the action conducts the action, the Court
14 may award to the defendant its reasonable attorneys' fees
15 and expenses if the defendant prevails in the action and the
16 Court finds that the claim of the person bringing the action
17 was clearly frivolous, clearly vexatious, or brought
18 primarily for purposes of harassment."

19 The CFCA contains the same stringent standard in requiring
20 that an action must be frivolous, vexatious or harassing before
21 any award of attorneys' fees to a prevailing defendant is
22 justified:

23 "If the state, a political subdivision, or the *qui tam*
24 plaintiff proceeds with the action, the Court may award to
25 the defendant its reasonable attorney's fees and expenses
26 against the party that proceeded with the action if the
27 defendant prevails in the action and the Court finds that
28 the claim was clearly frivolous, clearly vexatious, or
brought solely for purposes of harassment.

Cal. Gov't. Code § 12652(g)(9).

As a preliminary matter, under either federal or state law a
defendant seeking attorneys' fees in a false claims action, like
Timberworks herein, must establish that it was a prevailing
party.

1 The motions to dismiss which ultimately terminated the case,
2 however, were brought by the United States and the State of
3 California. Those motions were ultimately granted by the Court
4 on grounds that no actionable false claims violation had occurred
5 since the State awarded the construction contract in question to
6 Timberworks, and paid Timberworks' invoices, with full knowledge
7 of Timberworks' alleged noncompliance with disadvantaged business
8 entity ("DBE") requirements attached to the project. Because the
9 State's actions were taken in the face of complete disclosure as
10 to Timberworks' purported failure to incorporate a last-minute
11 DBE bid within its work proposal, the Court found that the State
12 could not have been defrauded. Am. Contract Servs. v. Allied
13 Mold & Die, Inc., 94 Cal. App. 4th 856, 862 (Cal. App. 2001);
14 U.S. ex rel. Durcholz v. FKW, Inc., 189 F.3d 542, 544-45 (7th
15 Cir. 1999).

16 It was primarily the State's knowledge of Timberworks'
17 behavior that precluded any potential false claims violation in
18 this case. Secondly, the Court also noted that to the extent
19 that Stierli's complaint took issue with the State's own policies
20 and procedures in awarding governmental contracts, the complaint
21 was defective on that ground as well, since the False Claims Act
22 "is not an appropriate vehicle for policing technical compliance
23 with administrative regulations." Allied Mold, 94 Cal. App. 4th
24 at 865-66, citing Durcholz, 189 F.2d at 545, n.2. Both bases for
25 the Court's ruling, however, focused on the State's role in this
26 litigation, whether through its knowledge of Timberworks behavior
27 or the impropriety of a false claims action challenging the
28 State's own contract award practices.

1 Neither rationale for dismissing Stierli's *qui tam* action on
2 behalf of the government focused on Timberworks' own conduct;
3 indeed, the Court expressly declined to rule on Timberworks' own
4 concurrently pending motion for summary judgment on the merits
5 after it granted the governmental entities' dismissal requests.
6 Because there was no decision in favor of Timberworks in that
7 regard, and since the motions that terminated the case were not
8 brought by Timberworks, it is difficult to fathom how Timberworks
9 can be considered a prevailing party in this lawsuit, as both the
10 FCA and CFCA fee statutes require.¹

11 Although Timberworks' inability to qualify as a prevailing
12 party would appear in and of itself to mandate denial of its
13 request for attorneys' fees, Timberworks' fee motion fares no
14 better if we proceed to the second part of the analysis and
15 consider whether Stierli's actions were "clearly frivolous",
16 "clearly vexatious", or brought either "primarily" or "solely"
17 for "purposes of harassment". Timberworks did not in fact
18 disclose that a DBE bid had been tendered, and the United States
19 Department of Transportation ("USDOT") did issue a report
20 concluding that Timberworks' efforts to meet DBE requirements
21 were only pro forma "because it never intended to use any DBEs"
22 and did not take all "necessary and reasonable steps" that one
23 would expect from a bidder "actively and aggressively trying to
24 obtain DBE participation". USDOT Report of Investigation, Ex. 1
25 to Pl.'s Opp., p. 41.

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27 ¹ The mere fact that Timberworks joined in the State's
28 Motion to Dismiss (as set forth in its April 12, 2006 Statement
of Non-Opposition to said Motion) does not make Timberworks a
prevailing party.

1 The USDOT concluded that this failure to secure adequate DBE
2 compliance was egregious enough to warrant withdrawal of federal
3 funding for the project. Id. at 42. While the Court ultimately
4 determined that the timing of the State's knowledge militated
5 against any false claim for payment that would support a viable
6 FCA or CFCA claim, that does not mean that there was no basis
7 whatsoever for Stierli's claims against Timberworks. Stierli's
8 claim that Timberworks's claim was invalid was, at least on its
9 face, supported by the findings of the USDOT as the federal
10 funding agency. The timing issues ultimately determined by the
11 Court to be crucial in ruling out a false claim for payment were
12 not fully elucidated prior to the pendency of this litigation.
13 Moreover, while Timberworks argues that the Allied Mold decision
14 was necessarily fatal to Stierli's claim, Stierli had at least a
15 viable argument for distinguishing that case on its facts. The
16 Court simply cannot conclude under these circumstances that
17 Stierli's action was clearly frivolous, clearly vexatious, or
18 brought primarily for purposes of harassment as it must to
19 justify an award of attorneys' fees under either 31 U.S.C. §
20 3730(d)(4) or Cal. Gov't. Code § 12652(g)(9). This
21 extraordinarily high standard can be met only if an action is
22 wholly lacking in both legal merit and evidentiary support. U.S.
23 ex rel. Mikes v. Straus, 98 F. Supp. 2d 517, 526 (S.D.N.Y. 2000).

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1 The simple fact that the Qui Tam Plaintiff did not ultimately
2 prevail does not mean that his action was per se unreasonable or
3 without foundation. Christiansburg Garment v. EEOC, 434 U.S.
4 412, 421-22.²

5 Based on the foregoing, Timberworks' Motion for Attorney's
6 Fees is DENIED.³

7 IT IS SO ORDERED.

8 DATED: September 8, 2006

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12 MORRISON C. ENGLAND, JR.
13 UNITED STATES DISTRICT JUDGE
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22 ²Timberworks urges the Court to conclude, even apart from
23 the merits of Stierli's FCA and CFCA claims, that his RICO cause
24 of action was patently untenable and therefore frivolous and
25 harassing. Plaintiff apparently believed his RICO theory was
26 tenable given an assertion that Timberworks engaged in mail fraud
by, for example, submitting fraudulent payment requests to the
State for payment. (See Pl.'s Compl., ¶¶ 48-51). This theory is
obviously related to Stierli's claims under the FCA and CFCA.
Merely pleading an alternative means of recovery does not itself
constitute frivolous, vexatious and/or harassing behavior.

27 ³Because oral argument would not be of material assistance,
28 this matter was deemed suitable for decision without oral
argument. E.D. Local Rule 78-230(h).